

“telecommunications services,” and therefore does not include electric utility attachments that are used to provide electricity.¹⁶

B. Utility Telecommunications Service Attachments Should Be Counted For Purposes of Allocating Costs of Non-Usable Space

Section 224(g) requires that a utility providing telecommunications services should impute to its costs of providing service an amount equal to the rate for which such company would be liable under this section. The FCC inquires as to whether a utility that is providing telecommunications services should also be counted as an attaching entity for the purposes of allocating the costs of non-usable space under Section 224(e). EEI and UTC agree that the statute would appear to require a utility or its subsidiary to be counted as an attaching entity for purposes of apportioning non-usable space, if it has attachments that are used to provide telecommunications services.

However, this requirement does not apply to utility communications attachments that are not used to offer telecommunications services. For example, utility attachments for private internal communications should not be counted as part of the apportionment of the costs of the non-usable space. Such communications systems are an integral part of providing reliable and safe electricity to the public.

C. ILECs Should Not Be Counted As Attaching Entities

The FCC tentatively concludes that an incumbent LEC with attachments on a pole should be counted for the purposes of apportionment of the costs of non-usable space. However, the FCC notes that the definition of “telecommunications carrier” excludes incumbent LECs, and a

¹⁶ An argument can also be made that under a literal reading of the statute cable attachments that are solely used to provide cable service should not be counted because they are not “attachments used by telecommunications carriers

“pole attachment” is defined as any attachment by a cable television system or a provider of telecommunications service, and therefore seeks comment on how to proceed.

EEI and UTC share in the FCC’s difficulty in reconciling the language of the Act with the Commission’s proposal that an ILEC with attachments on a pole should be counted for the purposes of apportionment of the costs of non-usable space. The statutory language is clear that the cost is to be apportioned among “telecommunications carriers” who use pole attachments to provide telecommunications services, and 224(a)(5) explicitly states that ILECs are not considered telecommunications carriers for pole attachment purposes. Given the literal terms of the Act it would be appropriate and reasonable for a utility to exclude ILEC attachments in determining the number of attaching entities.¹⁷

D. The Amount of Usable Space Required By An Attaching Entity Does Not Impact The Apportionment of The Non-Usable Space

The FCC seeks comment on the general premise that any telecommunications carrier should count as a separate attaching entity for each foot, or partial increment of a foot, it occupies on the pole and on the consistency of the methodology with the statutory requirement in section 224(e)(2) for equal apportionment among all attaching entities.

As discussed below, EEI and UTC believe that each attachment should be presumed to occupy at least one foot of space, and attachments requiring more than one foot of space should be assessed an additional one-foot for each increment of a foot that they require. However, the use of more than one foot for a single attachment should not be counted as more than one attachment. For purposes of calculating the number of attaching entities to apportion common

to provide telecommunications services...”

¹⁷ As with any rate, term or condition that is subject to negotiations, it would not be unreasonable for a utility to include an ILEC as a separate attaching entity in apportioning the cost of the non-usable space on a pole.

space each telecommunications attachment no matter how much space it requires should be presumed to count as only one attaching entity. This is consistent with the fact that all attaching entities benefit equally from the non-usable common space.

The premise that attaching entities should be counted on the basis of each foot, or partial increment of a foot, it occupies on a pole is also contrary to the plain language of the Act. The Act clearly calls for an allocation of 2/3 of the cost of non-usable space equally among “attaching entities.” By allocating costs on the basis of occupied space, the FCC’s proposal would make the allocation of non-usable space on the basis of usable space. This was clearly not the intent of Congress. In other parts of the Act, Congress did call for an allocation on the basis of usable space and would have done so with respect to non-usable space if that had been its intention.

E. Attachments Made By Government Agencies Should Not Be Included In The Calculation Of The Number Of Attaching Entities

The FCC proposes that attachments made by a government agency be included in the calculation of the number of attaching entities. EEI and UTC oppose this recommendation. Section 224(a)(4) clearly indicates that the term “pole attachments” applies to attachments by a cable television system or a provider of telecommunications service. That term does not include attachments by local governments for non-telecommunications purposes such as traffic signals, festoon lighting, or specific pedestrian lighting. Thus local governments are not “attaching entities” for purposes of allocating non-usable space.

Moreover, these local government attachments are for a common good often related to public safety. The FCC recognizes that often the agency does not directly pay for these attachments. Therefore it makes no sense for the utility to absorb all of these costs; rather these

costs should be paid jointly by all users of the pole as part of the local government's conditions for being able to be on a pole or provide service. Finally, the FCC is incorrect in its statement that government attachments are often part of the utilities franchise agreement. Attachments by government agencies are not usually part of the utility's franchise agreement but instead are part of the municipality's pole placement grant. This is the government agency's "charge" for placing a pole on its land, and as such this grant benefits all users of the pole.

F. Each Overlapping Entity Subject To A Separate Attachment Fee Should Count As A Separate Attaching Entity For Purposes Of Apportioning the Costs of the Non-Usable Space

The FCC seeks comment on how entities that have either overlapped to an existing attachment or are using dark fiber within the initial attachment of another entity should be counted for the purpose of allocating the costs of non-usable space. Specifically it inquires whether they should be considered as separate attachers for purposes of counting the number of entities on a pole

EEI and UTC recommend that each entity subject to a separate attachment fee as a result of overlapping should count as a separate attaching entity for purposes of apportioning the costs of the non-usable space because each such overlapper benefits from the existence of the common space to the same extent as all other attaching entities. Further, as discussed above, overlapping directly impacts the loading of the pole and therefore overlappers must be required to pay for the additional burden placed on the pole. For example, part of the non-usable space is the below ground portion that is needed to support the weight of the pole.

EEI and UTC recommend that the lease of dark fiber within an existing attachment or existing overlap should not be considered as a separate attachment for purposes of apportioning

the cost of the non-usable space on a pole. The lease of dark fiber within an existing attachment does not appreciably impact the loading capacity of the pole.

G. Each Utility Should Develop A Presumptive Average Number Of Attaching Entities On Its Poles

EEI and UTC support the FCC's recommendation that each utility develop, through the information it possesses, a presumptive average number of attachers on its poles. However, EEI and UTC oppose the suggestion that utilities be required to develop different presumptive averages for urban and rural areas. This would prove administratively difficult for many utilities and should therefore only be allowed as an option for utilities able to track this information.

EEI and UTC oppose the suggested alternative by which the FCC, and not the utility, would determine the presumptive average number of attachments. The responsibility should rest with the utility rather than with the FCC.

IX. ALLOCATING THE COST OF USABLE SPACE

In determining the proper rate formula for the calculation of the usable space charge under 224(e)(3), the FCC has proposed to continue to use its current cable rate methodology, modified to reflect only the costs associated with the usable space. EEI and UTC understand that this formula would only apply to attachments used for the provision of telecommunication service and would not apply to attachments used solely for the provision of cable service.

A. Allocation Of The Cost Of The Usable Space Required For Each Attachment

In calculating the cost of usable space under new section 224(e)(3) EEI and UTC urge the FCC to recognize that under the new rules the FCC is to look at the total how much space an attaching entity requires rather than what it merely occupies. Accordingly, it is recommended that the FCC ensure that attaching entities be responsible for space allocations that are required

in order to accommodate their attachments including clearances and NESC requirements. This would include for example mid-span sag created by overlashing, or spacing requirements resulting from tightly strung fiber optics.

B. Gross vs. Net

The FCC is seeks comment on whether to calculate a telecommunications carrier's pole attachment rate using gross book costs instead of net book costs. Under this approach the cost of a bare pole and most carrying charges are computed using gross book costs.

In responding to the interim rate rulemaking proceeding, CS Docket No. 97-98, the Joint Comments of EEI and UTC supported a rule that would allow a utility the flexibility to utilize either gross or net book costs in calculating pole attachment rates as long as they are consistent. It was also argued that the gross book cost must utilize gross costs throughout the calculation in order to be equitable. EEI and UTC recommend a similar flexible approach with regard to the rate formula being developed in the current proceeding.

C. Each Overlashing Entity Subject To A Separate Attachment Fee Should Be Considered As Having A Separate Attachment

The FCC seeks comment on whether an entity that has overlashed to an existing attachment or is using dark fiber within the initial attachment of another entity should be considered a separate attacher, with each entity deemed to be occupying one foot of usable space.

EEI and UTC reiterate that each overlashing entity that is subject to a separate attachment fee should be considered as a separate attacher for purposes of attributing usable space.

Overlashers should be presumed to occupy/require at least one foot of usable space. Such a presumption is warranted because, as discussed above, overlashing often requires additional space on the pole to maintain separations and clearance because of sag.

EEI and UTC do not believe that the lease of dark fiber by a third party, where permitted, from within an existing attachment or an authorized overlash has an impact on the amount of usable space required by an attaching entity. Accordingly, EEI and UTC do not believe an allocation of one foot of usable space should be attributed to entities that lease dark fiber from within existing attachments.

X. CONDUIT ATTACHMENT ISSUES

A. There Are Fundamental Operational Differences Between Utility Conduit and Telecommunications Conduit

In the interim rate formula proceeding, CS Docket No. 97-98, an effort was made by EEI and UTC in their Joint Comments and Reply Comments and by other utility representatives to inform the Commission as to inherent operational differences between electric utility ducts and conduits and telecommunications ducts and conduits. It is the understanding of EEI and UTC that those comments will be incorporated by reference into this proceeding and therefore these comments will not attempt to duplicate the points raised in that proceeding. Nevertheless, it bears repeating and emphasis that electric conduits have specific safety and reliability considerations that warrant special caution by the Commission in its application of the provisions of Section 224.

Electric vaults and manholes are crowded, confined quarters containing extensive electric equipment and circuits -- much of it high voltage -- which can pose grave potential dangers to untrained communications workers. Not only are important safety considerations involved, but the presence of non-utility personnel in electric vaults and manholes -- even if properly trained -- require special procedures and precautions that translate directly into additional costs to be borne by the utility and its customers.

B. Conduit System Access Costs Should Be Based On A Forward Looking Pricing Methodology

As with other utility facilities, EEI and UTC recommend the use of market forces and good faith negotiations between the parties to establish the rates, terms and conditions for telecommunications “attachments” to utility ducts and conduits. In those instances when the parties fail to reach an agreement the FCC should apply a forward looking pricing methodology. The use of a forward looking cost approach is particularly appropriate for valuing ducts and conduits because it recognizes that electrical conduit is a unique resource that cannot be readily duplicated. It also recognizes that ducts and conduits actually appreciate in value and therefore an historical cost approach would result in a dramatic under-valuation which translates into a massive subsidization of telecommunications companies by electric utility customers and shareholders.¹⁸ As indicated above, the use of forward looking costs for conduits is consistent with the FCC’s proposed approach for valuing conduits (and poles) for purposes of determining universal services contribution requirements.¹⁹

It is important to note that any calculation of a just and reasonable conduit rate must be based on a conduit system including ducts, conduit, cement or other encasement materials, vaults, handholes, manholes and other related equipment that allow for deployment of, access to, and maintenance of cable facilities.

C. A Half Duct Methodology Is Inappropriate For Electric Utility Conduits

The FCC proposes that usable space be based on the number of ducts and the diameter of the ducts. Specifically, the FCC proposes a half-duct methodology as the amount of space used

¹⁸ A utility may face significant costs in attempting to obtain new replacement conduit for its own requirements.

¹⁹ *Further Notice of Proposed Rulemaking*, Forward -Looking Mechanism for High Cost Support for Non- Rural LECs, CC Docket No. 96-45, released July 18, 1997, para. 104.

by a cable system or telecommunications carrier. As the utility industry pointed out in response to the same proposal in the interim rate proceeding, CS Docket No. 97-98, a half-duct methodology is wholly inappropriate for the pricing of access to electric utility conduit.

The half-duct formula assumes the ability of one attaching entity to share a duct with another "attaching entity." However, in the electric utility context such sharing is practically impossible because of the incompatibility of electric cables and telecommunications cables within the same duct. This fact is evidenced by the lack of joint use ducts between electric utilities and ILECs. In its *First Report and Order* implementing the access provisions of Section 224(f) the Commission indicated that it would not compel access in instances where the NESC prohibited such conduct. And yet, the Commission's proposed half-duct methodology is premised on access under conditions that the NESC prohibits. NESC Rule 341(A)(6) precludes electrical supply and communications cables from sharing the same duct unless the cables are maintained or operated by the same utility. Thus, the existence of a telecommunications "attachment" within a utility duct renders the entire duct non-usable for the electric utility. At a minimum this suggests the use of a full duct methodology.

Empty utility reserve ducts are necessary for the rapid restoration of power, and the existence of telecommunications cable within these ducts would preclude their use for electrical service. Pulling electric cable through a duct necessitated by a cable failure would destroy the smaller communications cable. In older, smaller duct systems, it can take three spare ducts to have reserves for one electric circuit because only one conductor will fit in a duct and there are three conductors to a circuit.

In addition, utilities require enough separation between underground conductors to ensure adequate cooling, in order to maximize, and properly maintain, current carrying capacity. This

means for instance, that reserve ducts must be closer to the outer edge of a conduit system in order to cool effectively.

In order to minimize the intrusion and confiscation of utility property, first-installing telecommunications companies should be required to install inner duct as part of make-ready, for subsequent telecommunications entities seeking attachments.

D. Non-Usable Conduit Space

In seeking to determine what portions of duct or conduit are "non-usable" within the terms of the 1996 Act the FCC proposes an overly narrow view of what constitutes a conduit system. The FCC proposes to adopt a presumptive ratio of usable ducts to maintenance ducts be adopted to establish the amount of non-usable space. The FCC proposal is unacceptable, as it would result in a gross under-recovery for the utility.

EEI and UTC propose that usable space be defined in terms of ducts that are physically occupied or that have been reserved for specific types of attachments. In addition to maintenance ducts, other than non-usable space includes all of the concrete and other materials as well as the surrounding earth²⁰ that comprise the conduit system. All users of the conduit (attaching entities) benefit from these materials in the use of the ducts.

E. Each Individual Cable and Telecommunications Line Should Be Counted As A Separate Attachment

EEI and UTC recommend that all cable and telecommunications lines occupying any portion of a duct should be considered a separate attaching entity for apportioning the "pole attachment" costs. As with poles, in determining the number of attaching entities it makes no difference how much capacity is actually being utilized by a particular wire.

²⁰ Often utilities truck in the surrounding earth at significant expense to reinforce the conduit system.

XI. RIGHTS-OF-WAY ISSUES

The FCC states its belief that the access and reasonable rate provisions of Section 224 are applicable where a cable operator or telecommunications carrier seeks to install facilities in a right-of-way but does not make a physical attachment to any pole, duct or conduit. The FCC inquires as to whether it should adopt rules reflecting a methodology and/or formula to determine a just and reasonable rate, or whether rights-of-way complaints should be addressed on a case-by-case basis.

Utilities do not own or control the vast majority of rights-of-way used for electric distribution purposes. These rights-of-way are owned or controlled by the local or state government. The use of right-of-way has rarely, if ever, been an issue. The Commission's proceedings and cases generally have addressed issues involving physical attachments to poles, ducts, or conduits; accordingly its experience relating to rights-of-way circumstances is limited. Moreover, state law will affect the validity and scope not only of any access requirement, but also compensation requirements.

The useable/non-usable formula is not applicable to rights-of-way. Moreover, a case-by-case determination is unworkable. At best such an approach would lead to inconsistent results; more likely and worse, the Commission will set a *de facto* methodology in the context of an individual case.

EEl and UTC recommend that the FCC adopt a policy that rates for the use of rights-of-way which the utility owns in fee be based on a negotiated amount or on the eminent domain compensation standard used in the particular state if negotiations fail. Negotiated rates are appropriate for property held in fee because these private rights-of-way were obtained by utilities at significant expense and should not be provided to telecommunications and cable entities at

below market rates. But for the utilities' earlier investment in the property, attaching entities would be required to pay fair market value to the property owner. The FCC should not address compensation for easements not owned in fee. Doing so will involve the underlying fee owner and the owner's claim for compensation. If the FCC decides to address easements it should defer to state real property law.²¹ This is supported by the Act's allowance of reverse preemption by the states contained in Section 224 (c).

XII. IMPLEMENTATION

The new rate methodology goes into effect on February 8, 2001. Section 224(e)(4) requires that any rate increase be phased in over five years in equal annual increments beginning on that date. EEI and UTC agree with the FCC's proposed interpretation of this provision as requiring that the amount of increase be phased in at the beginning of the five years (February 8, 2001) and that one-fifth of that amount should be added to the rate in each of the subsequent five years. As noted above, however, this phase-in only relates to situations where parties are unable to to agree on a rate and should not preclude parties from negotiating different rates or rate formulas.

XIII. CONCLUSION

As the FCC seeks to implement Section 224(e) its rules should enforce and exhibit a preference for negotiated agreements as the best means to carry out the intent of Congress. When the parties are unable to resolve a dispute over pole attachments the FCC should utilize forward looking pricing in order to approximate the actual value of the facilities.

²¹ EEI and UTC addressed, in their petition for reconsideration of the *First Report and Order* in CC Docket No. 96-98, the problems inherent in requiring utilities to exercise their rights of eminent domain on behalf of third parties.

The provision of any service other than cable television takes a cable company outside the realm of section 224(d) and at a minimum subjects them to the new fully-allocated cost formula of 224(e). Because of its operational and administrative impacts, overloading by any entity requires a separate agreement with the pole owner. In addition, overloading by an attaching entity or a third-party constitutes a separate attachment. The use of dark fiber within existing lines by attaching entities should not be regulated as a separate attachment under the Act.


The FCC's tentative conclusion that the 40-inch safety space emanates from a utility's requirement to comply with the NESC and should properly be assigned to the utility as part of its usable space should be rejected. The safety space comes from the need to protect communications workers from electric lines. It would not exist but for the presence of telecommunications cables and their workers on utility poles. If not assigned to the usable space of telecommunications and cable companies, EEI and UTC recommend that at a minimum the safety space be considered as "other than usable space" and be apportioned equally among all of the attaching entities.

Only "attaching entities" as defined under the Act are to be counted for the apportionment of non-usable space. Accordingly, EEI and UTC agree with the FCC's conclusion that the apportionment of common costs is expressly limited to those entities obtaining pole attachments to provide "telecommunications services," and therefore does not include electric utility attachments that are used to provide electricity. Nor does the Act apply to non-telecommunication service attachments by governmental entities. Finally, because ILECs are not "attaching entities" under the statute it is appropriate that they not also be counted in the two-thirds apportionment.


The FCC must recognize the inherent operational differences between electric utility ducts and conduits and telecommunications ducts and conduits. Electric conduits have specific safety and reliability considerations that warrant special caution by the Commission in its application of the provisions of Section 224. Any calculation of a just and reasonable conduit rate must be based on a conduit system. The FCC's proposed half-duct methodology is wholly inappropriate for the pricing of access to electric utility conduit. Rates for the use of right-of-way which the utility owns in fee be based on a negotiated amount or on the eminent domain compensation standard used in the particular state if negotiations fail.


WHEREFORE, THE PREMISES CONSIDERED, the Edison Electric Institute and UTC respectfully urge the Commission to take action on this *Notice of Proposed Rulemaking* in accordance with the views expressed in these comments.

Respectfully submitted,

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September 26, 1997

CERTIFICATE OF SERVICE

I, Melissa Muscio, hereby certify that I have caused to be sent, on this 26th day of September 1997, a copy of the foregoing to each of the following:

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